STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, DISABILITY RIGHTS WISCONSIN, INC., BLACK LEADERS ORGANIZING FOR COMMUNITIES, GUILLERMO ACEVES, MICHAEL J. CAIN, JOHN S. GREENE, and MICHAEL DOYLE,

Plaintiffs,

v.

DEAN KNUDSON, JODI JENSEN, JULIE M. GLANCEY, BEVERLY GILL, ANN S. JACOBS, MARK L. THOMSEN, MEAGAN WOLFE, and TONY EVERS,

Defendants.

Case No. 19-CV-00084

Case Code 30701 & 30704

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Wisconsin Constitution and Statutes

Wisconsin Legislative Materials

Other Authorities

INTRODUCTION

Governments are "limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities." *Duncan v. McCall*, 139 U.S. 449, 461 (1891). The Wisconsin Constitution, by design, functions as a "limitation upon the powers of the legislature." *Bushnell v. Beloit*, 10 Wis. 195, 225 (1860). Allowing the Legislature to "disregard the letter of the fundamental law" enables "a dangerous legislative tendency to regard [the Constitution's] provisions lightly or not at all." *State v. Marcus*, 160 Wis. 354, 370, 152 N.W. 419 (1915). Such a tendency risks the Constitution "failing to fully accomplish the great purpose of the people in the beginning." *Id.* For that reason, the Constitution "should be sturdily adhered to," *id.*, and the courts recognize that "[a]ny usurpation of power … is a wrong against the people who adopted the constitution as their charter of liberties and rights." *State v. Emery*, 178 Wis. 147, 151, 189 N.W. 564 (1922). Accordingly, when the Legislature acts "outside the constitution, [it] is without jurisdiction and its action null." *Marcus*, 160 Wis. at 362 (quotation omitted).

The Legislature acted "outside the Constitution" when it convened the December 2018 Extraordinary Session, during which it passed three bills and the Senate confirmed the appointment of 82 nominees to various State authorities, boards, councils, and commissions. Neither the Constitution nor any Wisconsin law authorized the Legislature to convene the December 2018 Extraordinary Session. It follows that the December 2018 Extraordinary Session was *ultra vires* and all actions taken during that session are "null" and therefore unenforceable.

Plaintiffs The League of Women Voters of Wisconsin ("LWVWI"), Disability Rights Wisconsin, Inc. ("DRW"), Black Leaders Organizing for Communities ("BLOC," a project of Center for Popular Democracy and CPD Action), Guillermo Aceves, Michael J. Cain, John S. Greene, and Michael Doyle filed suit to obtain a declaration that all actions taken during the

December 2018 Extraordinary Session are unenforceable. Plaintiffs also seek an injunction staying enforcement of the three Acts resulting from and the appointments confirmed during that session.

As set forth below, Plaintiffs meet the standard for temporary injunctive relief. They have a reasonable probability of success on the underlying merits. Absent injunctive relief, they and their constituents will suffer irreparable harm for which there is no adequate remedy at law. Further, injunctive relief is necessary to preserve the status quo. Accordingly, Plaintiffs respectfully request that this Court grant them the temporary injunction they seek.

THE DECEMBER 2018 EXTRAORDINARY SESSION

On Friday, November 30, 2018, the Assembly Committee on Assembly Organization and the Senate Committee on Senate Organization (the "Organizing Committees") each voted to convene the December 2018 Extraordinary Session. First Am. Compl. ¶¶27-28. The Organizing Committees acted in reliance on Joint Rule 81. Assembly Journal, Dec. 2018 Extraordinary Sess., at 968 (Wis. 2018).[1] Subdivision (2)(a) of that Rule provides that the convening of:

> an extraordinary session, may be authorized at the direction of a majority of the members of the committee on organization in each house or by the adoption of and concurrence in a joint resolution on the approval by a majority of the members elected to each house, or by the joint petition of a majority of the members elected to each house submitted to, and using a form approved by, the senate chief clerk and the assembly chief clerk.

In convening the December 2018 Extraordinary Session, the Legislature violated the Wisconsin Constitution in two ways. *First*, the Legislature violated Article IV, Section 11, which empowers the Legislature "to meet" in only two circumstances: "at such time as shall be provided by law" and when "convened by the governor in special session." The December 2018 Extraordinary Session does not fit in either category. It was not a "special session" called by the Governor. Nor was it "provided by law." Under Articles IV and V of the Constitution, legislative

[1] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20181203ede8.

enactments constitute "law" only if made in accordance with constitutional strictures, *see, e.g.*, *Marcus*, 160 Wis. at 361, including passage by the Legislature as a bill and signature by the Governor or override of the Governor's veto. Joint Rule 81 was not adopted "by bill," but instead by joint resolution of the Legislature, nor was it signed or vetoed by the Governor. *See* Assembly Joint Res. 23 (1977 Enrolled Joint Res. 10), 83rd Reg. Sess. (Wis. 1977), attached as Exh. A. Joint Rule 81 is, therefore, not "law," Wis. Const. art. IV, § 17(2), and cannot be the basis upon which the Legislature convenes a session "provided by law," Wis. Const. art. IV, § 11.

Second, the Legislature violated Article IV, Section 7, which mandates that a quorum of each house is necessary to conduct legislative business, such as convening sessions of the Legislature. Neither Organizing Committee comprises "a majority" of its respective chamber. Convening the December 2018 Extraordinary Session at the direction of the Organizing Committees, therefore, also violated the constitutional requirement that only "a majority of each [house]" constitutes the necessary "quorum to do business." *Id.* art. IV, § 7.

The December 2018 Extraordinary Session yielded four results:[2]

(1) 2017 Wisconsin Act 368, adopted by the Legislature as SB 883, signed by then-Governor Walker on December 13, and published the following day. *See* First Am. Compl. ¶¶36, 39, 47-49. Act 368 addresses taxes and limits how the Department of Transportation can allocate federal funds among highway projects in Wisconsin.

(2) 2017 Wisconsin Act 369, adopted by the Legislature as SB 884, signed by then-Governor Walker on December 13, and published the following day. *See* First Am. Compl. ¶¶40-41, 47-49. Act 369 addresses elections, the Department of Justice, agency rulemaking authority, and the adoption and use of guidance documents by agencies.

(3) 2017 Wisconsin Act 370, adopted by the Legislature as SB 886, signed by then-Governor Walker on December 13, and published the following day. *See* First Am. Compl. ¶¶37-38, 47-49. Act 370 addresses the administration of the State Medicaid program, including federal waivers and pilot programs.

[2] The First Amended Complaint provides greater detail about the Legislature's proceedings during the December 2018 Extraordinary Session. *See* First Am. Compl. ¶¶27-50.

(4) Confirmation of 82 nominees, *en masse*, to various State authorities, boards, councils, and commissions by a vote held December 4. *See* First Am. Compl. ¶¶42-43, 50. The nominees and the positions to which they were confirmed are listed in the Journal. *See* Senate Journal, Dec. 2018 Extraordinary Sess., at 980-83 (Wis. 2018).[3]

Each of these actions is unenforceable because the December 2018 Extraordinary Session was *ultra vires*. A temporary injunction is necessary to prohibit enforcement of the actions taken during the unlawful session and to prevent irreparable harm to Plaintiffs.

LEGAL STANDARD

The award of temporary injunctive relief is within a trial court's sound discretion. *State v. C. Spielvogel & Sons Excavating, Inc.*, 193 Wis. 2d 464, 479, 535 N.W.2d 28 (Ct. App. 1995). To obtain a temporary injunction, the movant must show: (1) a reasonable probability of ultimate success on the merits, (2) that the movant would suffer irreparable harm in the absence of a temporary injunction, (3) that a temporary injunction is necessary to preserve the status quo, and (4) that the movant has no other adequate remedy at law. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520-21, 259 N.W.2d 310 (1977); *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154.

1. Reasonable probability of success on the merits

Legislative failure to comply with constitutional requirements is fatal to the validity of the resulting action. *See Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶66, 243 Wis. 2d 512, 627 N.W.2d 807. As a result, determining compliance with such requirements is a threshold matter. *See id.* This Court's judicial review authority extends "far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements." *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 366, 338 N.W.2d 684 (1983) (quoting *McDonald v. State*, 80 Wis. 407, 412, 50 N.W. 185 (1891)). Moreover, because adhering

[3] Available at http://docs.legis.wisconsin.gov/2017/related/journals/senate/20181204ede8.

to the Constitution's procedural requirements is fundamental, when the Legislature is alleged to have violated such a requirement, "the court will not indulge in a presumption of constitutionality, for to do so would make a mockery of the procedural constitutional requirement." *Davis v. Grover*, 166 Wis. 2d 501, 549, 480 N.W.2d 460 (1992) (quoting *Brookfield v. Milwaukee Sewerage*, 144 Wis. 2d 896, 912 n.5, 426 N.W.2d 591 (1988)).[4]

Interpreting a constitutional provision is a question of law. *See, e.g.*, *Appling v. Walker*, 2014 WI 96, ¶17, 358 Wis. 2d 132, 853 N.W.2d 888 (citing *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408). "The authoritative, and usually final, indicator of the meaning of a [constitutional] provision is the text—the actual words used." *Coulee Catholic Schs. v. LIRC*, 2009 WI 88, ¶57, 320 Wis. 2d 275, 768 N.W.2d 868; *see also Coyne v. Walker*, 2016 WI 38, ¶249 n.2, 368 Wis. 2d 444, 879 N.W.2d 520 (Ziegler, J., dissenting). "Constitutions should be construed so as to promote the objects for which they were framed and adopted. 'The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time.'" *Dairyland*, 2006 WI 107, ¶19 (quoting *State ex rel. Bare v. Schinz*, 194 Wis. 397, 404, 216 N.W. 509 (1927)) (internal citation omitted). To ascertain that intent and relevant circumstances, courts also consider "the constitutional debates and the practices in existence at the time of the writing of the constitution[] and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption." *Wagner v. Milwaukee Cty. Election Comm'n*, 2003 WI 103, ¶18, 263 Wis. 2d 709, 666 N.W.2d 816.

[4] *See also Davis*, 166 Wis. 2d at 549 (Heffernan, C.J., dissenting) ("The concept of a 'presumption of constitutionality' is inappropriate when discussing legislative procedure. One of the rationales that justifies the use of the presumption of constitutionality is that when the legislature follows the constitutionally mandated procedures, the democratic safeguards ensure that a law is the will of the legislature. *Not so when a question of constitutional procedure arises*." (emphasis added; footnote omitted)).

2. Irreparable harm and preserving the status quo

At the temporary injunction stage, it is of no weight whether irreparable injury has yet occurred. *Joint Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 312-13, 234 N.W.2d 289 (1975). Rather, "the moving party must show there is a sufficient probability that the future conduct of the opposing party will violate a right of the movant" and that the movant's resulting injury "would be irreparable—not adequately compensable by money damages." *Nettesheim v. S.G. New Age Prods., Inc.*, 2005 WI App 169, ¶21, 285 Wis. 2d 663, 702 N.W.2d 449. Therefore, the harm need not be immediate; as long as it is "threatened or imminent," a temporary injunction should issue. *Joint Sch. Dist. No. 1*, 70 Wis. 2d at 312.

Misappropriation of public funds inflicts injury on all taxpayers. "Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss … because it results either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21-23, 112 N.W.2d 177 (1961). Thus, a "taxpayer seeking injunctive relief against claimed illegal expenditures of public monies … [is injured] even if such expenditure would not increase taxes and even though the ultimate pecuniary loss to the individual would be almost infinitesimal." *Gottlieb v. City of Milwaukee*, 90 Wis. 2d 86, 91-92, 279 N.W.2d 479 (Ct. App. 1979) (citing *Wagner v. City of Milwaukee*, 196 Wis. 328, 330, 220 N.W. 207 (1928)).

For this reason, "[t]he misappropriation of the public moneys forms good ground for … an injunction by the citizen and tax-payer … [because] a misappropriation of the funds is an injury to the tax-payer for which no other remedy is so effectual or appropriate." *Willard v. Comstock*, 58 Wis. 565, 571-72, 17 N.W. 401 (1883). Injunctions ensure the Legislature cannot "with impunity violate the constitutional limitations of its powers." *City of Appleton v. Town of Menasha*, 142

Wis. 2d 870, 878-79, 419 N.W.2d 249 (1988) (quoting *Columbia Cty. v. Wis. Ret. Fund*, 17 Wis. 2d 310, 319, 116 N.W.2d 142 (1962)). Absent injunctive relief to forestall taxpayer harms, "there exists no[remedy] whatever for the wrong. It becomes an evil wholly without means of prevention or redress by a process known to the law." *Lawson v. Schnellen*, 33 Wis. 288, 294 (1873).

Laws that require organizations to divert resources from their core missions or to impose injury upon their members similarly inflict irreparable harms. *See, e.g.*, *Wis.'s Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 19-20, 230 N.W.2d 243 (1975); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008). The harm imposed by a diversion of resources is particularly injurious where the diversion causes an organization "to lose opportunities to conduct election-related activities, such as voter registration and education." *League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018) (collecting cases); *see also, e.g.*, *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016). In such situations, courts recognize the propriety of declarative and injunctive relief. *See, e.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

ARGUMENT

Plaintiffs satisfy all four elements required for a temporary injunction. *First*, Plaintiffs have a reasonable likelihood of prevailing on the merits of their argument that the December 2018 Extraordinary Session was not convened within the constitutional bounds of the Legislature's authority. *Second*, Plaintiffs have properly alleged irreparable harms. *Third*, a temporary injunction is necessary to protect the status quo. *Fourth*, Plaintiffs have no adequate remedy at law.

I. PLAINTIFFS HAVE A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS.

The December 2018 Extraordinary Session was unconstitutionally convened. The Wisconsin Constitution authorizes the Legislature to meet only "at such time as shall be provided by law," unless "convened by the governor in special session." Wis. Const. art. IV, § 11. These two conditions are both absolute and exclusive. Because the December 2018 Extraordinary Session was neither a "special session" called by the Governor nor "provided by law," it was *ultra vires* and all actions taken during the session are unenforceable. *See Marcus*, 160 Wis. at 362. The plain text of Article IV, Section 11 makes clear that the Legislature convened the December 2018 Extraordinary Session outside the authority granted by the Constitution. The history of this provision, contemporaneous legislative interpretations, and authority from other states uniformly reinforce that conclusion. Moreover, by convening the December 2018 Extraordinary Session, the Organizing Committees—which are a small subset of each house—also violated Article IV, Section 7's requirement that a quorum be present to conduct legislative business.

A. The Wisconsin Constitution's Plain Meaning Precludes the December 2018 Extraordinary Session.

The Wisconsin Constitution has, throughout its various iterations, always limited the frequency and method by which the Legislature can meet. Wis. Const. art. IV, § 11. Initially, the Constitution restricted the Legislature to meeting "once in each year and not oftener." Wis. Const. of 1848 art. IV, § 11. This restriction was amended, in 1881, so that the Legislature could meet only once every two years, and then removed, in 1968, leaving in place the current text. The current text does not restrict frequency of sessions but maintains the limitation allowing the Legislature to convene on its own initiative only "at such time as shall be provided by law." Wis. Const. art. IV, § 11. The Constitution provides a single exception to this limitation, allowing for the Legislature

to be "convened by the governor in special session." *Id*. Such a "special session" is restricted to business "necessary to accomplish the special purposes for which it was convened." *Id.*

Outside of that single, restricted exception, the Legislature is authorized to meet only as "provided by law." Only one law, in turn, provides for meetings of the Legislature. That law establishes the manner by which the Legislature convenes in *regular session*:

> **Regular sessions.** The legislature shall meet annually.
>
> (1) The legislature shall convene in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business, but if the first Monday of January falls on January 1 or 2, the actions here required shall be taken on January 3.
>
> (2) The regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under sub. (3).
>
> (3) Early in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution.
>
> (4) Any measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year.

Wis. Stat. § 13.02. There is no authority—under the Constitution or Wis. Stat. § 13.02—for the legislative branch, let alone Committees comprising a small subset of each chamber, to convene a session that is not a regular session "provided by law" or a special session called by the Governor.[5]

Nevertheless, in convening the December 2018 Extraordinary Session, the Legislature invoked Joint Rule 81, which purports to authorize an *additional* way, not expressly authorized in the Constitution or provided in statute, to convene a session of the Legislature. The Legislature

[5] In the context of at least one other constitutional provision, the Wisconsin Supreme Court has held "that the [constitutional] drafters meant statutory law when they used by the phrase 'provided by law.'" *State v. City of Oak Creek*, 2000 WI 9, ¶27, 232 Wis. 2d 612, 605 N.W.2d 526. *But see Parsons v. Assoc. Banc-Corp.*, 2017 WI 37, ¶¶23-34, 374 Wis. 2d 513, 893 N.W.2d 212 (holding that Article I, Section 5's allowance for waiver of a jury trial "in the manner prescribed by law" is not limited to statutory law). Article IV defines "law" consistent with a limitation to statutory enactments. *See* Wis. Const. art. IV, § 17. This distinguishes *Parsons*, which turned substantially on the proximity in Article I, Section 5 of "by law" to the use of "by statute" in the following sentence.

could have adopted (and still may do so) statutory authority for convening in extraordinary session. What it cannot do, but did here, is rely upon Joint Rule 81—adopted by joint resolution rather than "by law"—to claim for itself the power to convene in extraordinary session. Because joint resolutions do not meet the constitutional standards for the enactment of laws, the extraordinary session, created exclusively on the initiative of the Legislature in Joint Rule 81, is not "provided by law" and is therefore not authorized by the Constitution.

The text of the Constitution specifically provides that a "law" must be: (1) a "bill," properly styled, that (2) passes both houses of the Legislature, is (3) presented to the governor, after which it is (4) either signed by the governor or repassed by a supermajority of the Legislature sufficient to override a gubernatorial veto, and (5) is published. Wis. Const. art. IV, § 17; *id.* art. V, § 10. A legislative enactment must satisfy each and every step of this process to become law. A joint resolution does not conform to these requirements and, therefore, is *not* law. This is a settled proposition. *See, e.g.*, 17 Op. Att'y Gen. 166, 166 (1928) ("Joint resolution of legislature does not have the force of law"), attached as Exh. B; *State ex rel. Fulton v. Zimmerman*, 191 Wis. 10, 16, 210 N.W. 381 (1926) (Legislature has "power to express the legislative will by joint resolution upon all matters which the Constitution does not require to be adopted with the formalities prescribed as essential to the passage of a law."); *State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 559, 126 N.W.2d 551 (1964) (holding Legislature's use of joint resolution to apportion legislative districts invalid); *Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶25, 319 Wis. 2d 439, 768 N.W.2d 700 (contract provision approved by Legislature but neither signed by Governor nor published "was not enacted by bill" and therefore "is not 'law'").[6]

[6] Other states' courts have repeatedly affirmed that joint resolutions lack the force of law. *See, e.g.*, *Dickinson v. Johnson*, 117 Ark. 582, 176 S.W. 116, 117 (1915) ("Thus a clear distinction is made between bills and concurrent resolutions. The one cannot take the place of the other. All laws must be passed by bill. Concurrent resolutions cannot be used to enact laws."); *State ex rel. Peyton v. Cunningham*, 39 Mont. 197, 103 P. 497, 498 (1909) ("No determination

That the December 2018 Extraordinary Session was convened by a mere majority of each Organizing Committee, rather than a majority of each house of the Legislature, is a further affront to the Wisconsin Constitution. The Constitution provides that "a majority of each [house] shall constitute a quorum to do business, but a smaller number may adjourn from day to day." Wis. Const. art. IV, § 7. The Organizing Committees that voted to convene the December 2018 Extraordinary Session do not comprise a majority of each chamber. Thus, the December 2018 Extraordinary Session doubly exceeded the Constitution's grant of legislative authority.

Plaintiffs do not dispute that the Constitution allows that "[e]ach house may determine the rules of its own proceedings." *Id.* art. IV, § 8. But this is not sufficient to authorize Joint Rule 81's creation of the extraordinary session as a whole-cloth addendum to Article IV, Section 11 or an evasion of Article IV, Section 7. Section 8 authorizes each house to create "those rules having 'to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members.'" *Milwaukee Journal Sentinel*, 2009 WI 79, ¶18 (quoting *Custodian of Records for the LTSB v. State*, 2004 WI 65, ¶30, 272 Wis. 2d 208, 680 N.W.2d 792. Such rules have a limited scope: they address the means by which each house conducts its business *during* a constitutionally authorized legislative session. They cannot be expanded to bootstrap *the existence of* a legislative session that does not meet constitutional muster.

Nor does Article IV, Section 8 insulate the Legislature's actions from judicial review. Plaintiffs do not allege that the Legislature failed to comply with its own Rules, but rather that Joint Rule 81(2)(a) exceeds the constitutional limits on the Legislature's power. That is a question the courts can—indeed must—reach. *See, e.g.*, H. Rupert Theobold, *Rules and Rulings:*

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can have the force of law unless [constitutional] requirements have been observed."); *State ex rel. Att'y. Gen. v. Kinney*, 56 Ohio St. 721, 724, 47 N.E. 569 (1897) ("The statute law of the state can neither be repealed nor amended by a joint resolution of the general assembly.").

Parliamentary Procedure from the Wisconsin Perspective, in State of Wisconsin 1985-1986 Blue Book at 140 (H. Rupert Theobold & Patricia V. Robbins eds., 1985) ("Although the [Legislature] can suspend its own rules, no legislature can disregard a constitutional limitation."); Richard Champagne, *Wisconsin Constitution Article IV, Section 8: Legislative Rules and Proceedings*, Vol. VI, No. 1 Constitutional Highlights from the Legislative Reference Bureau (Aug. 2006) ("The legislature is free to follow or not follow its own rules of proceedings. In the enactment of legislation, it is subject only to the Wisconsin and federal constitutions[.]"); *see also, e.g.*, *Outagamie Cty. v. Smith*, 38 Wis. 2d 24, 40, 155 N.W.2d 639 (1968) (the judiciary has power "to prevent any actions in excess of the authority vested in [the legislature] by the constitution").

Plaintiffs' argument here—that the December 2018 Extraordinary Session violated constitutional requirements—is thus a proper subject for judicial review. *See, e.g.*, *Wis. Prof'l Police Ass'n*, 2001 WI 59, ¶93 (holding that, where a legislative rule misconstrued the Constitution, the rule did not control; "Joint Rule 12 serves as a valuable interpretation of the constitution by the legislative branch. Ultimately, however, the judiciary must determine what the law is."); *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶51, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring) (quoting *Stitt*, 114 Wis. 2d at 365) ("[T]he legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review *unless the legislative procedure is mandated by the constitution*." (emphasis added)); *McDonald*, 80 Wis. at 412 (courts "will take like notice of the contents of the journals of the two houses of the legislature far enough to determine whether an act published as a law was actually passed by the respective houses in accordance with constitutional requirements"). To hold otherwise would negate the very notion of judicial review:

> The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative

> act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Mayo v. Wis. Injured Patients & Families Comp. Fund, 2018 WI 78, ¶84, 383 Wis. 2d 1, 914 N.W.2d 678 (R.G. Bradley, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)). "Judicial respect for its co-equal branch, the legislature, cannot amount to surrender of judicial power or abdication of judicial duty." *Id.*[7]

The Legislature "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892). The Constitution does not authorize an extraordinary session, and Joint Rule 81 does not constitute "law" within the meaning of the Constitution. Furthermore, Joint Rule 81's provision permitting the Organizing Committees, rather than a majority of each house, to convene an extraordinary session also violates the Constitution's quorum requirement. Accordingly, the December 2018 Extraordinary Session was unlawful.

B. Debates and Practices at the Time of Ratification Show that the Wisconsin Constitution Was Intended as a Limitation on the Legislature's Power to Convene Sessions.

The historical circumstances surrounding the adoption and amendment of Article IV, Section 11 confirm the December 2018 Extraordinary Session's unconstitutionality. Prohibiting the Legislature from calling itself into session was no accident; rather, it was the design of the Framers to effectuate the will of the people by limiting the powers of their representatives. *See Emery*, 178 Wis. at 152 (Constitution imposes limitations on the Legislature that may not be exceeded absent an express grant of authority). The historical context reveals this intent. By the end of the eighteenth century, "the focus of popular distrust had shifted from the King's courts to

[7] The December 2018 Extraordinary Session does not benefit from a presumption of constitutionality, because Plaintiffs allege noncompliance with a procedural requirement of the Constitution. *Davis*, 166 Wis. 2d at 549 (quoting *Brookfield*, 144 Wis. 2d at 912 n.5). This Court interprets the relevant constitutional provisions as a matter of law, and the Legislature's failure to comply with constitutional process requirements renders the actions taken at the December 2018 Extraordinary Session unenforceable. *See Wis. Prof'l Police Ass'n*, 2001 WI 59, ¶66.

the people's representatives." *Estate of Makos by Makos v. Wis. Masons Health Care Fund*, 211 Wis. 2d 41, 62, 564 N.W.2d 662 (1997) (Crooks, J., concurring) (internal quotation marks omitted), *overruled on other grounds by Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849.[8] "After an unsuccessful early period during which state constitutions continued expansive grants of authority to the legislative branch, the people, disillusioned by what they perceived as legislative corruption … enacted a 'second wave' of state constitutions stripping legislatures of many of their prerogatives." David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1200 (1992). When Wisconsin adopted its Constitution—during this "second wave"—the decision to limit legislative meetings was uncontroversial and adopted without reported debate. *See* Ray A. Brown, *The Making of the Wisconsin Constitution* (pts. 1 & 2), 1949 Wis. L. Rev. 648, 663 (1949), 1952 Wis. L. Rev. 23, 28 (1952).

Further, the 1968 amendment that resulted in Article IV, Section 11's current form affirms an intent to clearly define the Legislature's authority to convene meetings. According to a contemporaneous Legislative Reference Bureau ("LRB") analysis, the amendment sought to require the Legislature to adopt a "pre-planned schedule" of work periods "by which certain stages of the legislative process must be completed." Selma Parker, *Constitutional Amendments to be Submitted to the Wisconsin Electorate*, LRB-WB-68-1, at 9 (1968).[9] Accordingly, the amendment modified Article IV, Section 11's text as follows: "The legislature shall meet at the seat of government at such time as shall be provided by law~~, once in two years, and no oftener~~, unless convened by the governor~~,~~ in special session, and when so convened no business shall be

[8] *See also, e.g.*, Ray A. Brown, *The Making of the Wisconsin Constitution* (pt. 1), 1949 Wis. L. Rev. 648, 655 (1949) (noting that the public discussion of whether to ratify the proposed Wisconsin Constitution of 1846 was characterized by "distrust … towards government and government officials.").

[9] Available at http://lrbdigital.legis.wisconsin.gov/digital/collection/p16831coll2/id/1320/rec/61.

transacted except as shall be necessary to accomplish the special purposes for which it was convened." Wis. Const. of 1968 art. IV, § 11. Advocates of the amendment argued that, by establishing "a *precise* schedule around which each legislative session can be planned," they would avoid an end-of-session logjam in which votes were all concentrated "in a relatively short span of time," "leav[ing] little time for reflection on the issues which are then voted and result[ing] in ill considered legislation." Parker, *Constitutional Amendments to be Submitted to the Wisconsin Electorate*, at 9 (emphasis added). In other words, the amendment's proponents hoped to avoid just the sort of unplanned, rushed legislative proceedings that occurred during the December 2018 Extraordinary Session. *See* First Am. Compl. ¶¶27-46.

Notably, the LRB analysis contains no mention of anything resembling an extraordinary session convened by the Legislature, nor was the idea familiar to either the drafters who authored the 1968 amendment or the voters who approved it. Indeed, nearly a decade passed before the Legislature first adopted Joint Rule 81 and claimed the authority to convene an extraordinary session. *See* Assembly Joint Res. 23 (1977 Enrolled Joint Res. 10), 83rd Reg. Sess. (1977), attached as Exh. A. Several more years went by before the Legislature invoked Joint Rule 81 to convene, for the first time, an extraordinary session. *See* Daniel F. Ritsche, *Special and Extraordinary Sessions of the Wisconsin Legislature*, LRB-IB-14-2 at 6, 11 (2014).[10]

In any event, the amended language of Section 11 makes plain that "special sessions" are the only constitutionally sanctioned mechanism to convene legislative meetings outside those "provided by law." Wis. Const. art. IV, § 11. Even on those "special" occasions, determined solely by the Governor and convened upon his call, the business conducted must be limited to "the special

[10] Available at http://legis.wisconsin.gov/eupdates/sen07/Special_and_extraordinary_sessions_of_the_Wisconsin_Legislature_Aug_2014.pdf.

purposes" for which the session was called. *Id.* By claiming the authority to convene extraordinary sessions, the Legislature has, on its own initiative and without approval from the people, carved out an additional exception to Article IV, Section 11. This it cannot do. As a further affront to Article IV, Section 11's limitations, Joint Rule 81(2)(a) also jettisons the express limitation on the scope of legislative business during a non-regular session to only those "special" subjects articulated by the Governor. By conducting an end run around these textual limitations, the December 2018 Extraordinary Session violated both the text and the intent of the Constitution.

C. The Legislature's Earliest Interpretations of the Wisconsin Constitution Accept the Limits on the Legislature's Authority to Convene Sessions.

The statutes contemporary to the Constitution and its amendments likewise envision that legislative meetings are limited to regular sessions and special sessions called by the Governor. *See Dairyland*, 2006 WI 107, ¶45 ("[L]aws enacted immediately following passage" of a constitutional amendment "are a crucial component of any constitutional analysis because they are clear evidence of the legislature's understanding of that amendment."). Since the adoption of the Constitution, the Legislature has enacted only one statute pursuant to Section 11: the very first year following ratification, the Legislature enacted what has since been renumbered § 13.02, providing that the "regular annual session of the legislature shall commence on the second Wednesday in January in each year." *See* Wis. Stat. ch. 8, § 1 (1849). Although the text of § 13.02 has been modified slightly in intervening years, the only sessions for which the Legislature has "provided by law" remain regular sessions. *See, e.g.*, Wis. Stat. ch. 10, § 99 (1878) ("The regular annual session of the legislature shall commence on the second Wednesday in January in each year."). There is not now, and has not been to date, authorization "provided by law" for the Legislature to convene in extraordinary session.

Pursuant to § 13.02, the Legislature commenced the 2017-18 legislative session on January 3, 2017. *See* Senate Joint Res. 1, 103rd Reg. Sess. (Wis. 2017).[11] It delineated several regular session floor periods, but none in December 2018. *See id.* The Legislature adjourned the 2017-18 regular session on March 22, 2018. Assembly Journal, 103rd Reg. Sess., at 908 (Wis. 2018); Senate Journal, 103rd Reg. Sess., at 871 (Wis. 2018).[12] Consequently, all bills that had not been passed by both houses of the Legislature were adversely disposed of, definitively marking the conclusion of the 2017-18 regular session. *See* Assembly Journal, 103rd Reg. Sess., at 917 (Wis. 2018); Senate Journal, 103rd Reg. Sess., at 881 (Wis. 2018).[13] The 2017-18 regular session calendar allowed for only one other floor period, and that floor period was limited to consideration of vetoes issued by the Governor. *See* Senate Joint Res. 1, 103rd Reg. Sess., at 3. At no time during the 2017-18 session did the Legislature amend its calendar to add more regular session floor periods. Instead, through the operation of Joint Rule 81, it called itself, *ultra vires*, into the December 2018 Extraordinary Session to consider new bills—not introduced during the regular session—that were ultimately adopted and sent to then-Governor Walker for his signature.

Any claim that the December 2018 Extraordinary Session was "provided by law" would depart from the Legislature's earliest interpretations of the Constitution and from later interpretations by the Wisconsin Attorney General and the Wisconsin Supreme Court. Such a claim would, therefore, contradict the goal of construing constitutional provisions "to promote the objects for which they were framed and adopted." *Dairyland*, 2006 WI 107, ¶19 (citing *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328).

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[11] Available at https://docs.legis.wisconsin.gov/2017/related/enrolled/sjr1.pdf.

[12] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180322.pdf and https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180322.pdf, respectively.

[13] Available at https://docs.legis.wisconsin.gov/2017/related/journals/assembly/20180328.pdf and https://docs.legis.wisconsin.gov/2017/related/journals/senate/20180328.pdf, respectively.

D. Other State Constitutions Similarly Impose Limits on the Legislature's Power to Convene in Special or Extraordinary Session.

Other states have concluded that their legislatures may not lawfully convene a legislative session outside the exclusive procedures set forth in their state constitutions. According to the Florida Supreme Court, for example, "A legislature [*sic*] body has no inherent power to convene itself in special or extraordinary session for any purpose. It enjoys such power only when so endowed by the organic law. When such authority is granted by the Constitution it must be exercised strictly in accord with the stipulations of the organic grant." *Advisory Op. to the Gov.*, 95 So. 2d 603, 605 (Fla. 1957) (per curiam). Similarly, the Pennsylvania Supreme Court held that the constitution granted the power to convene special or extraordinary sessions of the legislature to "the executive alone." *In re City of Pittsburg*, 217 Pa. 227, 230, 66 A. 348, *aff'd sub nom. Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

Pennsylvanians later amended their constitution to expressly allow the legislature to convene "on petition of a majority of the members elected to each House." Pa. Const. art. II, § 4. Other states in which the legislature may convene itself in special or extraordinary sessions have similarly express constitutional authority. *See, e.g.*, Iowa Const. art. III, § 2 ("Upon written request to the presiding officer of each house of the general assembly by two-thirds of the members of each house, the general assembly shall convene in special session."); Kans. Const. art. I, § 5 ("The governor may, on extraordinary occasions, call the legislature into special session by proclamation; and shall call the legislature into special session, upon petition signed by at least two-thirds of the members elected to each house."); N.J. Const. art. IV, § 1(4) ("Special sessions of the Legislature shall be called by the Governor upon petition of a majority of all the members of each house, and may be called by the Governor whenever in his opinion the public interest shall require.").

Within the past two years, other states have held to this strict rule. In New Hampshire, the House Legal Counsel, a former state supreme court justice, explained that a statute lowering the constitutional threshold for the legislature to call a special session was unconstitutional and needed to be amended "to comport with the Constitution." *See* Letter from Charles G. Douglas III, House Legal Counsel, New Hampshire House of Representatives, to Paul Smith, Clerk, New Hampshire House of Representatives (July 11, 2017).[14] And in Utah, when the legislature sought to establish a mechanism to convene itself in an extraordinary session, the legislature called for a constitutional amendment, which was then subject to a statewide referendum. *See* Utah H.J.R. 18 (2018), "Proposal to Amend Utah Constitution – Special Sessions of the Legislature."[15]

Ignoring the Constitution's plain meaning would render Wisconsin an outlier on this issue.

* * *

The plain meaning of the Wisconsin Constitution, historical context, the Legislature's own contemporaneous interpretations, and other states' interpretations of analogous constitutional provisions all compel the same conclusion: "Unless specifically authorized by constitutional provision, a legislature has no authority to convene itself in special [or extraordinary] session, and its actions under an attempt to do so are void." Norman J. Singer & J.D. Shambie Singer, 1 *Sutherland Statutory Construction* § 5:1 (7th ed.).

The December 2018 Extraordinary Session was neither a "special session" called by the Governor nor a regular session "provided by law"—the only two categories of legislative sessions authorized by the Wisconsin Constitution. The December 2018 Extraordinary Session was therefore *ultra vires*, and all business conducted as part of the session is unenforceable. *Id.*; *see*

[14] Available at https://htv-prod-media.s3.amazonaws.com/files/douglasletter-1499905463.pdf.

[15] Available at https://le.utah.gov/~2018/bills/static/HJR018.html.

also, e.g., *Alaska S.S. Co. v. Mullaney*, 84 F. Supp. 561, 563 (D. Alaska 1949) (concluding that, if the legislative session was invalid, "the acts of the Legislature at its Extraordinary Session … were without authority and, hence, void"). Because the Legislature acted outside its constitutional bounds in convening the December 2018 Extraordinary Session, the judiciary must exercise its fundamental duty to enforce the Constitution. *See, e.g.*, *Bonnett v. Vallier*, 136 Wis. 193, 203, 116 N.W. 885 (1908) ("[T]he duty of the court to repel [legislative] encroachment and so uphold the constitution is absolute. It has no discretion in the matter.").

II. WITHOUT A TEMPORARY INJUNCTION, PLAINTIFFS FACE IRREPARABLE INJURIES.

Plaintiffs will suffer irreparable injury absent an injunction staying enforcement of the unlawful December 2018 Extraordinary Session's fruits—2017 Wisconsin Acts 368, 369, and 370, as well as the Senate confirmation of 82 nominees—during the pendency of this litigation.

A. Plaintiffs League of Women Voters of Wisconsin and Black Leaders Organizing for Communities Will Suffer Irreparable Harms in the Absence of a Temporary Injunction.

Absent an injunction, Plaintiffs LWVWI and BLOC will suffer irreparable injuries.[16] Section 1K of 2017 Wisconsin Act 369 "changes the period of time during which in-person absentee voting is permitted." Wisconsin Legislative Council, *Amendment Memo: 2017 Senate Bill 884, Senate Substitute Amendment 1* (hereinafter "SB 884 LC Mem.") at 3 (Dec. 11, 2018).[17] Under Section 1K, "in-person absentee voting may occur from 14 days preceding the election to the Sunday preceding the election, but cannot occur on a legal holiday." *Id.* Act 369 also codifies

[16] On January 17, 2019, a federal court clarified that its injunction bars some changes contained in 2017 Wisconsin Act 369. *One Wis. Inst. v. Thomsen*, --- F. Supp. 3d ---, No. 15-CV-324-JDP, 2019 WL 254093 (W.D. Wis. Jan. 17, 2019). That clarification does not nullify the harms alleged here. The underlying injunction could be vacated or modified at any time in the pending appeal at the Seventh Circuit. Additionally, all Plaintiffs here allege harms beyond the scope of and unaffected by the federal injunction.

[17] Available at https://docs.legis.wisconsin.gov/2017/related/lcamendmemo/sb884.pdf.

the "petition process contained in [Wisconsin Department of Transportation] administrative rules permitting an individual who does not possess otherwise required documentation to obtain a State ID card for voting by providing secondary documentation or through other verification." *Id.* at 2.

As the Legislative Finance Bureau advised, "in *One Wisconsin Institute v. Thomsen*, [198 F. Supp. 3d 896 (W.D. Wis. 2016) (appeal pending),] the U.S. District Court for the Western District of Wisconsin ruled that the State-imposed limits on dates, days, and times for in-person absentee voting are unconstitutional, with the exception of the prohibition applicable to the Monday before Election Day." Legislative Fiscal Bureau, *December 2018 Extraordinary Session Bills as Passed by the Legislature* (hereinafter "LFB Mem.") at 14 (Dec. 6, 2018).[18] The *Thomsen* court also found that the existing petition process, set forth in administrative rules, "impose[d] severe burdens on the right to vote" in violation of the First and Fourteenth Amendments. 198 F. Supp. 3d at 948-49. The now-codified petition process is even more constitutionally infirm because it provides that temporary receipts are valid for only a 60-day period, rather than the 180-day period that the *Thomsen* court found critical to preventing voters from being disenfranchised. *See* Grunze Aff., ¶12, attached as Exh. C.

Act 369's restrictions on early voting and codification of the ID petition process are likely to directly and imminently undermine both LWVWI and BLOC's missions to increase voter participation and to ensure that every eligible voter can take part in Wisconsin elections. Grunze Aff., ¶11; Lang Aff., ¶¶9-11, attached as Exh. D. Wisconsin voters will have at least one, if not two, opportunities to vote before a final resolution of this matter: the February 19, 2019 Spring

[18] Available at http://docs.legis.wisconsin.gov/misc/lfb/bill_summaries/2017_19/0002_december_2018_-extraordinary_session_bills_as_passed_by_the_legislature_12_6_18.pdf.

nonpartisan primary is now only one week away, and the April 2, 2019 Spring nonpartisan election will be held just six weeks later. *See* Wisconsin Elections Commission, *Spring 2019 Election*.[19]

There are important, contested races on the ballot for these elections. LWVWI and BLOC expect that, if enforced, Act 369's early voting restrictions will reduce voter turnout at these elections by limiting opportunities for voter participation. Grunze Aff., ¶11; Lang Aff., ¶¶9-11. Absent the strictures of Act 369, some municipalities would likely be offering early voting for the nonpartisan primary already. *See* Grunze Aff., ¶9; Lang Aff., ¶9. In the wake of Act 369, those early voting opportunities are not available. In the 2018 general election, approximately 25 percent of early voters statewide and 23.5 percent of early voters in Milwaukee County submitted their ballots prior to Act 369's restricted time frame, according to absentee ballot reports by the Elections Commission. Grunze Aff., ¶9; Lang Aff., ¶9. BLOC is particularly concerned that the limitations on early voting will impede participation by Black voters. Lang Aff., ¶¶8, 11. In addition, both LWVWI and BLOC expect that Act 369's petition process, in particular the reduction of temporary identification cards' validity to 60 days (from 180 days), will prevent eligible voters from participating in these elections. Grunze Aff., ¶12; Lang Aff., ¶12.

Federal courts have already found that the earlier version of the voter ID law and limits on early voting violated the First and Fourteenth Amendments as an undue burden on the right to vote. *Thomsen*, 198 F. Supp. 3d 896; *see also Frank v. Walker*, 196 F. Supp. 3d 893, 904 (E.D. Wis. 2016) (appeal pending) (finding irreparable harm to plaintiffs who could not with reasonable effort obtain qualifying ID to be able to vote in any elections occurring before final resolution of their claims). The loss of First Amendment freedoms constitutes *per se* irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Equally irreparable is the harm to Plaintiffs as organizations

[19] Available at https://elections.wi.gov/elections-voting/2019/spring.

engaged in core political speech and association while promoting exercise of the right to vote. *See Georgia Coal. for People's Agenda v. Kemp*, No. 1:18-CV-04727-ELR, 2018 WL 5729058, at *11 (N.D. Ga. Nov. 2, 2018) (finding that plaintiffs, "as organizations, will also suffer irreparable injury distinct from the injuries of eligible voters" because "Plaintiffs' organizational missions, including registration and mobilization efforts, will continue to be frustrated").

Moreover, if enforcement of Act 369 is not temporarily enjoined, LWVWI and BLOC will continue to have to shift their efforts immediately to informing voters about the changes to early voting and to helping them through the petition process. LWVWI and BLOC have inevitably missed opportunities to register voters when they are expending resources instead on voter education and advocacy related to Act 369's provisions. Grunze Aff. ¶¶8, 10-12; Lang Aff. ¶¶6-7, 13-14. BLOC will be required to divert significant resources—approximately 25% of its staff time—to educate voters about the changes to early voting in Milwaukee, instead of performing other activities to accomplish its core mission. Lang Aff., ¶13. The loss of valuable time to engage in core political speech and association and to add new eligible voters to the election rolls is irreparable and has no adequate remedy at law. *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1339 (S.D. Fla. 2006) (finding irreparable harm to community organizations engaged in collecting and submitting voter registration applications, where their voter registration operations had been interrupted and they were losing valuable time to engage in core political speech and association and to add new registrants to the election rolls); *Georgia Coal. for People's Agenda*, 2018 WL 5729058, at *11 ("Without an injunction to address the citizenship verification procedure, Plaintiffs' … organization resources will be diverted to assist with the citizenship mismatch issue. Such mobilization opportunities cannot be remedied once lost.").

In addition, as long as any section of the three bills is enforced, LWVWI suffers irreparable harm to its mission to promote transparent, constitutional governance, and BLOC suffers irreparable harm to its mission to encourage greater participation in government. The unconstitutional December 2018 Extraordinary Session undermines public confidence in State government. Grunze Aff., ¶13; Lang Aff., ¶15. The resulting laws are tarnished by a process that not only violated the Constitution, as described above, but also lacked transparency. LWVWI testified to this at the December 3, 2018, Joint Committee on Finance hearing: "Good legislation does not result from a rushed, secretive process with little opportunity for input from the public or even the agencies that will be charged with implementing the changes." December 2018 Extraordinary Session Bills: Hearing before the Joint Comm. on Finance, Dec. 3, 2018 (statement of Ingrid Rothe, Chair of the LWVWI Legislative Committee).[20] If the laws adopted during the December 2018 Extraordinary Session are not enjoined, their implementation and enforcement will taint the operations of Wisconsin government in the eyes of the public. That taint, which undermines LWVWI and BLOC's abilities to meet their core missions and exercise fundamental rights, cannot be removed by any legal relief afforded at the conclusion of this litigation.

B. Plaintiff Disability Rights Wisconsin Will Suffer Irreparable Harms in the Absence of a Temporary Injunction.

Absent an injunction, Plaintiff DRW and the constituents it serves will suffer irreparable injuries. DRW has a State and federal mandate to protect and advocate for the rights of persons with disabilities in Wisconsin. Kerschensteiner Aff., ¶6, attached as Exh. E. The majority of the people with disabilities that DRW advocates on behalf of as the State's protection and advocacy system are Wisconsin residents who are Medicaid-eligible or Medicaid recipients. *Id.*, ¶8. Multiple

[20] Available at available at https://my.lwv.org/wisconsin/article/league-testimony-joint-committee-finance-extraordinary-session-bills.

laws passed in the extraordinary session will impair DRW's mandated mission and the rights of the constituents DRW serves.

First, and similar to the issues faced by Plaintiffs LWVWI and BLOC, Act 369's restrictions on early voting will undermine DRW's mission of ensuring that people with disabilities in Wisconsin are afforded opportunities to cast their votes. *Id.*, ¶22. Limiting the time frame for persons with disabilities to access the polls increases the effort required by DRW to assist clients with disabilities in doing so. *Id.* Further, these provisions limit the opportunities for electoral participation for people with disabilities, thereby impairing DRW in fulfilling its federal mandate of securing election access, including registering to vote, casting a vote, and accessing polling places for Wisconsinites with disabilities. *Id.* These restrictions will also require DRW to divert its resources away from responding to barriers to poll access for persons with disabilities towards ensuring their constituents' franchise rights. The loss by DRW's constituents of the right to participate at the polls in the upcoming elections cannot be remedied once those elections have passed.

Second, DRW and its constituents are likely to suffer irreparable harm from Section 10 of 2017 Wisconsin Act 370, which requires an express legislative mandate before the Wisconsin Department of Health Services ("DHS") may "submit[] a request to a federal agency for a waiver or a renewal, modification, withdrawal, suspension, or termination of a waiver of federal law or rules, or for authorization to implement a pilot program or demonstration project." LFB Mem. at 29-30. By curtailing DHS' authority to efficiently and effectively advance such waiver programs, Section 10 frustrates DRW's ability to informally and effectively work in collaboration with the State executive agency that most directly affects the lives of people with disabilities in Wisconsin. Kerschensteiner Aff., ¶10. In turn, DRW is hindered from fulfilling its statutory mandate as

Wisconsin's protection and advocacy system to pursue administrative remedies that protect the rights of people with disabilities. *Id.* Section 10 further forces DRW to divert resources from its proactive efforts to assist people with disabilities and instead expend more of its limited time and financial resources advocating for and advancing terms of Medicaid waiver programs in a manner beneficial to its constituency. *Id*.

Third, DRW and its constituents anticipate irreparable injury from the codification, in Act 370, of a Medicaid waiver program approved by the federal Centers for Medicare and Medicaid Services on October 31, 2018, but not yet implemented. *See* LFB Mem. at 38-39. Cementing the terms of a waiver in statute impedes DRW from pursuing and achieving informal, cost-effective administrative modifications benefiting persons with disabilities, thereby harming DRW's constituents and frustrating DRW's efforts to fulfill its statutory mandate as Wisconsin's protection and advocacy system. Kerschensteiner Aff., ¶11. DRW anticipates that the inflexibility created by codification of waiver programs will further harm it and its constituents by requiring DRW to divert resources from its proactive efforts to assist people with disabilities, and instead force it to devote more of its limited time and financial resources to investigating and addressing unintended issues that arise during the implementation and enforcement of the waiver. *Id*.

Fourth, DRW and its constituents will be harmed by specific provisions in the Medicaid waiver, codified as part of Act 370, that will have detrimental effects on people with disabilities. These include drug screening and testing requirements, *see* LFB Mem. at 33-36, the imposition of work requirements, *see id.* at 38, and the creation of a new monthly premium for Medicaid-eligible individuals, *see id.* at 38-39, all of which impose new threshold requirements for Medicaid-eligible people with disabilities to access the Medicaid services to which they are entitled. Each of these requirements will disproportionately harm DRW's constituents and could lead to more people with

disabilities being denied Medicaid coverage. Kerschensteiner Aff., ¶12. Typically, when a new Medicaid waiver program is rolled out, unanticipated issues related to the implementation or administration of the program are identified and addressed through guidance documents, State Medicaid plan amendments, and contract amendments. *Id*. It is likely that DRW will be unable to similarly work through DHS to address the issues that are likely to arise out of the codification of the new waiver program adopted as part of Act 370 and, as a result, DRW's constituents will be harmed. *Id*.

Fifth, DRW anticipates that enforcement of the provisions in Act 370 may further delay implementation of amendments to the State Medicaid Purchase Plan ("MAPP") program, which have been approved by the Legislature. *Id.*, ¶20. Delay of the MAPP amendments affects the ability of some of DRW's constituents to gain access to Medicaid coverage because changes to the medical needy monthly income limits have not yet been implemented. *Id*. Uncertainty regarding the implementation of the provisions of Act 370 will also likely pose a significant challenge to DHS in meeting the Family Care waiver renewal deadline of January 1, 2020. *Id*.

Sixth, DRW and its constituents are harmed by Section 13 of Act 370, which requires legislative approval before DHS may seek federal approval for proposed amendments to Wisconsin's Medicaid program "if the estimated fiscal effect of the proposed plan amendment … is greater than $7,500,000 from all revenue sources in the 12-month period following its implementation date." LFB Mem. at 32. DRW will likely be unable to seek timely or effective redress for programmatic or administrative issues that arise within the State Medicaid program because of the significant time and cost associated with the requirements included as part of Act 370. Kerschensteiner Aff., ¶13. It is likely that DHS' limited financial and staff resources will preclude its pursuit of legislative approval for every contract modification, policy change, or state

Medicaid plan amendment that it and/or DRW seeks to make throughout the year and during waiver periods. *Id*. Furthermore, the increased time and complexity associated with the adoption of State Medicaid plan amendments will harm DRW's constituents because many amendments may go unadopted or may not be adopted in a timely manner. *Id*. Moreover, the increased time and complexity associated with the adoption of State Medicaid plan amendments will also require DRW to divert its resources from its proactive efforts assisting people with disabilities and instead devote more of its limited time and financial resources to advocating for statutory amendments to the State Medicaid plan in a manner advantageous to people with disabilities in Wisconsin. *Id*.

Seventh, the implementation Act 370's provisions related to Medicaid plan amendments will also likely cause DRW to be impaired from seeking timely redress of systemic issues that routinely arise in the administration of the State Medicaid program, which will increase the number of service denials DRW's constituents face and will limit DRW's ability to resolve these issues for people with disabilities as a group and instead require it to litigate claims individually. *Id.*, ¶18. As the protection and advocacy system for people with disabilities receiving Medicaid services in Wisconsin, DRW will likely be required to expend more of its limited staff time and financial resources participating in Medicaid hearings before State agencies and litigating these issues in court. *Id*. These provisions are likely to frustrate DRW's ability to achieve its mission and impair DRW's ability to fulfill its statutory mandate as Wisconsin's protection and advocacy system. They also will require DRW to divert its resources away from its proactive efforts to protect disabled persons' access to Medicaid services and opportunities for gainful employment and instead force it to devote more of its limited time and financial resources to assisting these individuals in accessing coverage and investigating claims brought by persons related to the increased difficulty obtaining coverage and the denial of access to Medicaid services. *Id*.

Eighth, DRW and its constituents will also be harmed by Section 38 of Act 369, which imposes new limitations on agency guidance documents. *See* LFB Mem. at 12-13. As Wisconsin's protection and advocacy system, DRW has, over 40 years, identified legal issues that people with disabilities confront and has successfully worked with State agencies to develop appropriate administrative responses. Kerschensteiner Aff., ¶14. Many of those responses have been memorialized in agency guidance documents, which ensure that, when the same issue arises for different individuals and/or in different areas of the State, the response is efficient, effective, and consistent. *Id*. DRW routinely seeks to advocate for modifications to the State's Medicaid program through DHS' issuance of informal guidance documents, State Medicaid plan amendments, or contract changes and then uses these channels as the one of primary means by which it fulfills its protection and advocacy functions. *Id*. It is likely that these methods will no longer be routinely available to DRW, or will be severely constrained, and DRW's protection and advocacy functions will be impaired as a result of the implementation of Act 370. *Id*. In addition, the anticipated rescission and amendment of guidance documents will impair DRW's ability to fulfil its federal mandate as the State's protection and advocacy system by making it more difficult for DRW to achieve efficient, effective, and consistent results for people with disabilities who face common challenges under Wisconsin law, and will instead require DRW to divert its resources towards ensuring that newly adopted, amended, or rescinded guidance documents do not harm people with disabilities' access Medicaid to and other services upon which they rely. *Id*.

Ninth, DRW and its constituents will also be harmed as a result of Sections 35 and 80 of Act 369, which eliminate judicial deference to certain agency interpretations, decisions, and orders and will create uncertainty; discourage the consistent application of the laws they are charged with enforcing; encourage litigation; and result in increased costs to administrative agencies and the

Department of Justice, which is tasked with defending administrative actions. *Id.*, ¶19. As a result, DRW will be forced to divert resources away from its protection and advocacy function in order to defend its constituents' claims in administrative and judicial review proceedings. *Id.*

Each of the above-described provisions of Act 369 and Act 370 will harm not only DRW as an organization, but also the constituents DRW has a statutory mandate to protect. These provisions are likely to injure DRW's constituents disproportionately, because the provisions will likely frustrate their access to Medicaid services; hamper their participation in the electoral process; and impair the efficient and effective development and adoption of new and innovative Medicaid waiver programs and State Medicaid plan amendments that would provide access to programs and services designed to enhance the lives of people with disabilities.

For the above stated reasons and because of the immediate and rolling effective dates of these provisions, DRW and its constituents will be irreparably harmed if these provisions are enforced.

C. Absent a Temporary Injunction, the Individual Plaintiffs Will Suffer Irreparable Harms.

The individual plaintiffs will, in the absence of an injunction, suffer irreparable injuries. Wisconsin law provides that irreparable harm occurs when the damage associated with the loss of a right or benefit is impossible to quantify. The Wisconsin Supreme Court explained this principle in *American Mutual Liability Insurance Company v. Fisher*, 58 Wis. 2d 299, 306, 206 N.W.2d 152 (1973). At issue there was a lease dispute involving the provision of parking spaces adjacent to the plaintiff's business. The court held that an injunction was appropriate because the plaintiff could not be adequately compensated, either in damages or with parking spaces at an alternate location, for the loss of spaces immediately adjacent to its business. "Where a defendant's wrong threatens a plaintiff with the loss of business and the amount of the plaintiff's future damages are difficult or impossible to ascertain, this court has held that a plaintiff's remedy at law would be inadequate

and that an injunction is an appropriate remedy." *Id*. So, too, with damages that are intangible and cannot be reduced to damages. *See Nettesheim*, 2005 WI App 169, ¶22 (loss of secluded roadway "would irreparably injure the [Plaintiffs'] peace of mind and their residential seclusion, injuries not adequately compensable by money").

1. Plaintiff Guillermo Aceves will suffer personal pecuniary harms that cannot be estimated in the absence of a temporary injunction.

Plaintiff Guillermo Aceves will suffer irreparable harm absent an injunction barring enforcement of 2017 Wisconsin Act 368's constraints on State allocations of federal transportation funds. Act 368 "requires the Department of Transportation to expend federal funds on at least 70 percent of the aggregate project components eligible for federal funding each fiscal year for [specified] types of projects." Wisconsin Legislative Council, *Amendment Memo: 2017 Senate Bill 883, Senate Amendment 1, as Amended* (hereinafter "SB 883 LC Mem.") at 2 (Dec. 7, 2018).[21] According to the Legislative Fiscal Bureau, "[a]s a result, the provision would limit the number of projects subject to federal requirements associated with the use of federal highway aid (such as federal prevailing wage or environmental requirements)." LFB Mem. at 8.

Mr. Aceves is a member of the International Union of Operating Engineers Local 139 and is employed by Arbor Green, Inc., as a heavy equipment operator. Aceves Aff. ¶¶3-4, attached as Exh. F. Arbor Green is a contractor on construction projects managed by the Wisconsin DOT. *Id.* Arbor Green is a woman-owned business certified for purposes of the Disadvantaged Business Enterprise program that is intended to increase the participation of such businesses in DOT projects that use federal funds. *Id.*, ¶6. Plaintiff Aceves and his employer's business will suffer direct harm from enforcement of Act 368, which reduces the number of State transportation projects that are

[21] Available at https://docs.legis.wisconsin.gov/2017/related/lcamendmemo/sb883.pdf.

eligible for federal funds. *Id.*, ¶5. For one thing, this reduction will likely reduce the number of construction projects available for work by Arbor Green, and thus Mr. Aceves. *Id.*, ¶7. For another, the reallocation of federal funding will limit the number of projects subject to federal prevailing wage laws and Copeland Act protections. *Id.*, ¶8. Act 368 will, by limiting opportunities for Mr. Aceves and his employers, reduce Mr. Aceves's overall earnings. *Id.*, ¶9. It is impossible to quantify the amount of work to which Mr. Aceves will lose access, or to calculate the loss in revenue to his company. Nor is it possible to quantify or compensate Mr. Aceves for the perpetual diminution in income he will suffer as a result of Act 368. Therefore, damages cannot adequately compensate him for his loss. *See Am. Mut. Liab. Ins. Co.*, 58 Wis. 2d at 306. As explained above, such losses of benefits and unquantifiable monetary losses constitute irreparable harm. *Id*.

2. Taxpayer Plaintiffs Michael J. Cain and John S. Greene will suffer irreparable harms in the absence of a temporary injunction.

Plaintiffs Michael J. Cain and John S. Greene will suffer unquantifiable and irreparable harm of a different sort. Mr. Cain and Mr. Greene are Wisconsin taxpayers who each had long careers advancing the public interest, as attorneys for the Departments of Natural Resources and Justice, respectively. *See* Cain Aff., ¶¶2-4, attached as Exh. G; Greene Aff., ¶¶2-4, attached as Exh. H. They will suffer irreparable harm as a result of various provisions of Act 369.

First, Mr. Cain and Mr. Greene will both suffer irreparable harm as a result of Act 369's provisions relating to agency guidance documents. As taxpayers, Mr. Cain and Mr. Greene anticipate suffering pecuniary loss and injury due to the significant taxpayer funds that will be expended by State agencies in reviewing existing guidance documents for compliance with Act 369; the significant costs agencies will incur in modifying their existing guidance documents to meet the requirements of Act 369; and the anticipated rescission of guidance documents that will

impair the DNR and other State agencies in applying those provisions of Wisconsin law they are charged with enforcing. Cain Aff., ¶¶5, 8-12; Greene Aff., ¶6.

Enforcement will likely cost the State millions in taxpayer dollars and agency staff time to comply with the provisions of Act 369 affecting State agency administrative rules, guidance documents, and policies, because compliance will require significant staff hours and resources to bring thousands of State guidance documents into alignment with those provisions. Cain Aff., ¶¶8-9; *see also* Greene Aff., ¶6. It is also likely that implementing the provisions of Act 369 affecting State agency administrative rules, guidance documents, and policies will cause significant disruption and delay to State agencies' processing of permit applications, because technical staff will be required to divert their efforts from processing permit applications and instead focus on implementing the provisions contained in Act 369. Cain Aff., ¶10. Further, enforcement of the provisions of Act 369 affecting State agency administrative rules, guidance documents, and policies will undermine consistency in the administration of State agency programs and the training of State agency staff, because many guidance documents will not be brought into compliance with these provisions within the six-month period they mandate and will be subject to rescission. Cain Aff., ¶11; Greene Aff., ¶6. As a result, State agencies will be precluded by law from using or relying on these documents for training purposes, program administration, and guidance to applicants for permits as they prepare application materials and project plans. Cain Aff., ¶10. The implementation of the provisions of Act 369 affecting State agency administrative rules, guidance documents, and policies is both wasteful and unnecessary. Cain Aff., ¶12.

Second, Mr. Cain and Mr. Greene anticipate suffering pecuniary loss and injury as Wisconsin taxpayers because of Sections 35 and 80 of Act 369, which eliminate judicial deference to certain agency interpretations, decisions, and orders and will create uncertainty; encourage

litigation; and result in increased costs to administrative agencies and the Department of Justice, which is tasked with representing administrative agencies. Cain Aff., ¶13; Greene Aff., ¶8.

Third, Mr. Cain and Mr. Greene will suffer pecuniary loss and injury as Wisconsin taxpayers as a result of the confirmation of 82 appointees to various State authorities, boards, councils, and commissions, because those confirmations will necessitate the unlawful disbursement of tax revenues to pay salaries, benefits, per diems, and expense reimbursements to individuals serving on various State authorities, boards, councils, and commissions who were not lawfully appointed to those positions because their confirmation occurred as part of the unconstitutional December 2018 Extraordinary Session. Cain Aff., ¶14; Greene Aff., ¶7.

Fourth, Mr. Greene will suffer pecuniary loss and injury as a Wisconsin taxpayer from Section 27 of Act 369, which mandates that "DOJ must deposit all settlement funds into the general fund" and provides that, for settlement "monies to be appropriated as directed by the court or settlement agreement, the Legislature would need to enact legislation." LFB Mem. at 16. As a taxpayer and based on his experience as a former Wisconsin Assistant Attorney General, Mr. Greene anticipates that this provision will preclude the Attorney General from committing the State to specific uses of settlement funds, including, for example, providing restitution to consumers harmed by violations of the State's consumer protection laws; will prevent the Attorney General from entering into settlements financially advantageous to the State; and will discourage opposing parties from entering into settlement agreements with the State. Greene Aff., ¶9. In addition, Mr. Greene anticipates this provision will result in further injury and pecuniary loss due to the increased costs associated with seeking statutory authorization to expend settlement funds. *Id.* Such funds are sometimes received in multiple payments over long periods of time on an irregular basis. *Id.* Should the Legislature fail to enact legislation implementing the terms of a

settlement, the settlement could be voided—even years after the fact—resulting in costly additional litigation by the Attorney General and additional losses on the part of the State. *Id.*

Fifth, Mr. Greene anticipates that he will suffer pecuniary loss and injury as a Wisconsin taxpayer as a result of Sections 5, 7-8, and 28-29 of Act 369, which authorize the Legislature to intervene and participate alongside the Attorney General in litigation involving the State of Wisconsin. *See* SB 884 LC Mem. at 4-7. These provisions will result in the illegal disbursement of tax revenues due to the increased costs associated with the needless expenditure of resources related to litigation involving State actions. Greene Aff., ¶10. Mr. Greene anticipates that these provisions will make litigation involving State statutes and regulations more complex, lengthier, and more expensive, increasing costs and resulting injury and pecuniary loss. *Id.*

Sixth, Mr. Greene anticipates that he will suffer pecuniary loss and injury as a Wisconsin taxpayer as a result of Section 30 of Act 369, which requires the Attorney General to consult the Legislature before settling any litigation involving the State, even in those instances where the Legislature is not a party. *See* SB 884 LC Mem. at 7-8. This provision will impede and delay settlements by the Attorney General, is likely to deter parties from negotiating settlements with the State, and will likely preclude the State from entering into financially beneficial settlements. Greene Aff., ¶11. Mr. Greene anticipates that this provision will reduce settlements and increase litigation by the State, increasing costs and resulting in injury and pecuniary loss. *Id.*

Because the expenditures outlined above arise from the unlawful December 2018 Extraordinary Session, they are unlawful. Mr. Cain and Mr. Greene anticipate that Acts 368 and 369 will cause them irreparable harm as taxpayers and as a former State employees.

3. Plaintiff Michael Doyle will suffer irreparable harms in the absence of a temporary injunction.

Plaintiff Michael Doyle is the duly-elected Green County Clerk. *See* Doyle Aff., ¶¶2-3, attached as Exh. I. Clerk Doyle was elected Green County Clerk as an Independent. *Id.*, ¶3. Clerk Doyle has been elected Green County Clerk 13 times and has served in that capacity for 31 consecutive years. *Id.*, ¶4. Clerk Doyle is a constitutional officer charged with the administration of County, State, and federal elections in Green County. *Id.*, ¶5. Clerk Doyle alleges that various provisions of 2017 Wisconsin Act 369 were unlawfully adopted and anticipates that enforcement will impair his ability to fulfill his constitutional and statutory charge. *Id.*, ¶7-13. Accordingly, Clerk Doyle anticipates suffering various irreparable harms—both direct and indirect—in his official capacity, due to the enforcement of numerous provisions of Act 369. *Id.*, ¶6-13.

First, Clerk Doyle anticipates that he will be harmed, in his official capacity, by Section 1K of Act 369, which "changes the time during which in-person absentee voting is permitted." SB 884 LC Memo at 3. Under Section 1K, "in-person absentee voting may occur from 14 days preceding the election to the Sunday preceding the election, but cannot occur on a legal holiday." *Id.* These restrictions on early voting limit the opportunities for voter participation in Wisconsin elections, harm Wisconsin voters who would otherwise have broader opportunities to participate in elections, and injure Clerk Doyle's ability to carry out his constitutional and statutory obligations by impairing his ability to fulfill his duties of assuring that eligible Green County voters are able to participate in the election process. *Id.*, ¶8.

Second, Clerk Doyle anticipates that he will be harmed, in his official capacity, by various provisions of Act 369, which will necessitate him, and Green County, to expend resources they would not otherwise expend to educate County election officials regarding changes to the new provisions governing early voting. *Id.*, ¶9. In addition, Act 369 will require Clerk Doyle to consult

outside entities to determine the allowable methods for early voting in order to ensure compliance by and minimize legal risk to Green County and all municipalities located within the County. *Id.* These provisions will cause injury to Clerk Doyle, and Green County, due to the need to make expenditures of time and taxpayer funds that would not otherwise be necessary. *Id.*

Third, Clerk Doyle expects that he will be harmed, in his official capacity, by various provisions of Act 369 because they will create confusion among voters and add to the difficulty, complexity, and cost associated with administering elections in Green County. *Id.*, ¶10. The Election Administration Manual, which was approximately 20 pages two decades ago, is now 254 pages long. *Id*. Due to the increased frequency with which the Legislature amends voting requirements, as well as the increased complexity of the election laws, municipalities located within Green County have experienced difficulty attracting and retaining municipal clerks and other election officials. *Id*. This results, at least in part, from some prospective employees' concerns about their ability to accurately synthesize and explain to others, including voters, the legal requirements of Wisconsin's voting laws, as well as concerns about the legal and practical consequences that could arise if they were provided or acted upon misinformation. *Id*. As a result, these provisions will cause injury to Clerk Doyle, and Green County, due to the constant and ongoing need to make expenditures of time and taxpayer funds to train and re-train municipal clerks and other local election officials—expenditures that would otherwise not be necessary. *Id*. Finally, voters and election personnel are likely to experience confusion because of the codification of new voter-identification requirements, thereby resulting in the inefficient administration of elections and injury to Clerk Doyle. *Id*.

Fourth, Clerk Doyle also anticipates that he will be harmed, in his official capacity, by provisions of Act 369 that shorten the early-voting period and newly codify voter-identification

requirements, both of which are likely to create longer lines at designated early polling places. *Id.*, ¶11. Longer lines could discourage voters from participating in elections, and anticipation of longer lines will likely increase voter requests for absentee ballots by mail. *Id.*, ¶11. All of these anticipated effects harm Clerk Doyle's ability to carry out his constitutional and statutory obligations. *Id*. Specifically, these anticipated effects will impair his ability to fulfill his duties of ensuring that eligible Green County voters are able to participate in the election process. *Id*.

Finally, Clerk Doyle expects that he will be harmed, in his official capacity, by Act 369 due to various provisions that will hamper his ability to efficiently administer elections in Green County due to the difficulties that individuals with disabilities and the elderly are likely to experience in exercising their franchise rights. *Id.*, ¶12. These individuals are often unable to travel to designated polling places. *Id*. As a result, municipal election officials will often personally deliver ballots to these individuals so that they may legally exercise their right to vote in their own residence. *Id*. A shortened early-voting period provides less opportunity, and more difficulty, for election personnel to travel to individuals' homes to facilitate them voting. *Id*. As a result, Clerk Doyle, and Green County, will be injured by the increased difficulty of guaranteeing the franchise rights of every voter wishing to exercise those rights. *Id.*

Because the expenditure and diversion of resources, outlined above, arise from the unlawful December 2018 Extraordinary Session, the Acts giving rise to these harms are unenforceable. *Id.*, ¶7. As a result, Clerk Doyle anticipates that Act 369 will cause him, in his official capacity as Green County Clerk and as a duly-elected constitutional officer, as well as the office of County Clerk, irreparable harm. *Id.*, ¶¶2-13.

III. A TEMPORARY INJUNCTION IS NEEDED TO PRESERVE THE STATUS QUO.

Enjoining the application of the challenged laws is necessary to preserve the status quo. The Wisconsin Supreme Court has recognized that where, as here, the movant has shown a

reasonable probability of success on the merits and the prospect of serious or irreparable injury, "it is well-nigh an imperative duty of the court to preserve the status quo by temporary injunction." *Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377 (1964) (internal quotation marks omitted). "[C]ourts define 'status quo' as the last peaceable, uncontested status of the parties which preceded the actions giving rise to the issue in controversy." *Praefke Auto Elec. & Battery Co. v. Tecumseh Prod. Co.*, 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000); *accord, e.g.*, *Stemple v. Bd. of Educ. of Prince George's Cty.*, 623 F.2d 893, 898 (4th Cir. 1980).

Here, the status quo is the state of the law before the Legislature unconstitutionally convened the December 2018 Extraordinary Session, during which it passed three bills that were signed into law by then-Governor Walker—2017 Wisconsin Acts 368, 369, and 370—and the Senate confirmed 82 nominees. If the challenged laws are not enjoined now, Wisconsin will immediately begin to experience significant changes to its system of government, to the administration of federal benefits and programs, to election administration, and to transportation projects throughout the State. From Plaintiffs' perspective, maintaining the status quo is critical to avoiding the irreparable harms that will ensue if Acts 368, 369, and 370, as well as the Senate confirmations voted on during the December 2018 Extraordinary Session, are enforced. A permanent injunction after a full adjudication of the merits would be insufficient to undo the significant changes to Wisconsin's government, State programs, and upcoming elections, as well as the harms to Plaintiffs.

IV. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW.

"To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff. To invoke the remedy of injunction the plaintiff must moreover establish that the injury is … not adequately compensable in damages." *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶42, 264 Wis. 2d

60, 665 N.W.2d 257. As detailed above, all Plaintiffs face irreparable harms for which no remedy at law exists if the results of the December 2018 Extraordinary Session are enforced. To recap:

- To the extent that voters lose opportunities to vote in the 2019 Spring elections, the harms to these voters resulting from the restrictions in Act 369 are immediate, irreparable, without adequate remedy at law. So, too, for LWVWI, BLOC, and DRW, which are impaired in meeting their core missions and required to divert significant resources by the operation of the law. *See League of Women Voters of Fla.*, 447 F. Supp. 2d at 1339; *Georgia Coal. for People's Agenda*, 2018 WL 5729058, at *11 ("Such mobilization opportunities cannot be remedied once lost.").

- The Medicaid-related provisions of Act 370 will irreparably harm DRW's constituents by frustrating their access to medical services. The deprivation of health care services has no adequate remedy at law short of injunctive relief. Moreover, the diversion of DRW's resources required by the law cannot be recuperated and is also irreparable.

- Act 368's constraints on DOT allocations of federal funding to transportation projects will directly harm Mr. Aceves by reducing his opportunities and his overall earnings. Because it is impossible to quantify with certainty the diminution in Mr. Aceves's income directly attributable to the enforcement of Act 368, his losses cannot be adequately remedied at law and are properly redressed by injunctive relief. *See, e.g.*, *Am. Mut. Liab. Ins. Co.*, 58 Wis. 2d at 306.

- Because Mr. Cain and Mr. Greene have no way to quantify and recover the losses arising from the unlawful appropriation of their tax dollars, they have no adequate remedy at law. *See id.*; S.*D. Realty Co.*, 15 Wis. 2d at 21-23; *Willard*, 58 Wis. at 571-72. Accordingly, as with the harms to Mr. Aceves, Mr. Cain's and Mr. Greene's injuries are irreparable and can be appropriately addressed only through injunctive relief.

- Clerk Doyle anticipates being irreparably harmed, in his official capacity, by various provisions of Act 369 that unlawfully impair his ability to carry out his constitutional and statutorily mandated duties to administer elections in Green County. *State v. Coubal*, 248 Wis. 247, 255, 21 N.W.2d 381 (1946) (law is unconstitutional where it withholds "from constitutional officers [the] essential prerogatives of their offices"). In addition, Clerk Doyle, in his official capacity, and the Office of the County Clerk, will be irreparably harmed by the needless expenditure of time and taxpayer resources to implement the unlawful provisions of Act 369.

Because those harms are not compensable in damages, Plaintiffs have no adequate remedy at law.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the proposed order for a temporary injunction.

Dated: February 12, 2019.

Respectfully submitted,

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